IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1625

THOMAS JACKSON STONES, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Thomas Jackson Stones, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District entered in this proceeding on November 14, 1978.

OPINION BELOW

The unreported opinion of the Court of Appeal appears in the appendix to this petition (Appendix "A"), as does the order of the California Supreme Court denying a hearing to review that opinion (Appendix "B").

JURISDICTION

The judgment of the California Court of Appeal for the Second Appellate District was entered on November 14, 1978. A timely Petition for Rehearing was denied on December 12, 1978, and the California Supreme Court denied a timely Petition for Hearing on January 24, 1979. This Petition for Writ of Certiorari was filed within ninety days of the California Supreme Court's denial of a hearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. **Whether a probation revocation resulting from a hearing conducted without prior notice of alleged violations fails to afford a probationer due process guaranteed to him by the Fifth Amendment.**

2. **Whether an appellate court may rely upon grounds not relied upon by the finder of fact in affirming a revocation of probation.**

STATUTORY PROVISIONS INVOLVED

California Penal Code § 1203.2: Rearrest of Probationer; revocation of probation . . . :

"(a) At any time during the probationary period of a person released on probation . . . , any probation or peace officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him before the court or the court may, in its discretion, issue a warrant for his rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest, the court may revoke and terminate such probation if the interest of justice shall require and the court, in its judgment, has reason to believe from a report of the probation officer or otherwise that the person has violated any of the conditions of his probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he has been prosecuted for such offenses . . . .

"(b) Upon its own motion or upon the petition of the probationer or the district attorney of the county in which the probationer is supervised, the court may modify, revoke, or terminate the probation of the probationer pursuant to this subdivision. The court shall give notice of its motion, and the district attorney shall give notice of his petition to the probationer, his attorney of record, and the probation officer; the probationer shall give notice of his petition to the probation officer; and notice of any such motion or petition shall be given to the district attorney in all cases. The court shall refer its motion or the petition to the probation officer. After the

receipt of a written report from a probation officer, the court shall read and consider the report and either its motion or the petition and may modify, revoke or terminate the probation of the probationer upon the grounds set forth in subdivision (a) if the interests of justice so require.

"The notice required by this subdivision may be given to the probation officer upon his first court appearance in such proceeding . . . . "

STATEMENT OF THE CASE

Thomas Stones was convicted upon a plea of nolo contendere of conspiracy and fraud in connection with the sale of securities and was granted probation for a term of ten years. Among the conditions of that probation was the requirement that Stones "not participate in any way in the sale or dissemination of any securities or tax shelter programs without first seeking approval of the program or venture from the appropriate authorities . . . . " In addition, Stones was prohibited from "participat[ing] in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the Probation Office supervising his probation and, if the venture would likely take place in whole or in part in Ventura [or Los Angeles] County, he shall not participate in this venture without first fully informing the District Attorney of the County of Ventura [or Los Angeles as the case may be] of the details of the contemplated venture." Further, Stones' conditions of probation required that he "obey all laws, orders, rules and regulations of the Court and of the Probation Department."

While on probation, Stones met with Laurence Casey, an FBI special agent, and Charles Marko, a government informant. Casey was posing as an insurance company executive seeking to remedy a dollar impairment in his company by the acquisition of securities at discount. At the meeting, Stones agreed to provide $46,000 worth of bonds for $2,000 in cash and Marko's note for $4,500. Casey was later advised by a fellow agent that the bonds were stolen, but charges against Stones for theft of the bonds were dismissed.

On November 28, 1977, Stones' probation was revoked and he was ordered imprisoned for the term prescribed by law for his crime. The trial court concluded that Stones' agreement with Casey and Marko violated the conditions of his probation that he not participate in the sale or dissemination of any securities or tax shelter programs without first seeking approval of the program or venture from the appropriate authorities, and that he not participate in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the Probation Officer and District Attorney. (Appendix pp. 2 - 4).

Stones appealed the revocation of his probation to the California Court of Appeal. In its Opinion affirming that revocation, the Court of Appeal agreed with Stones that there was no probation violation in his not seeking agency approval for sale of the bonds to Casey and that there was no evidence that he failed to inform the District Attorney and Probation Office of his intention to sell the bonds. (Appendix p. 5).

The Court of Appeal, however, affirmed the action

of the trial court based upon its implicit finding that no notice had been provided to the Probation Office or the District Attorney of Stones' intention to sell bonds. The Court of Appeal said that that implicit finding could have been based upon the statement in the *probation report* that Stones did not notify the Probation Office or the District Attorney of his intention to sell bonds and that "even in the absence of an affirmative showing by respondent of the fact that there was no notice given to the Probation Office or the District Attorney of appellant's activities in securities," affirmance was appropriate, "since being in the nature of a negative averment, the burden for showing the contrary may fairly be placed upon appellant." (Appendix p. 6).

Finally, the Court of Appeal conceded that Stones had not been provided with written notice of claimed violations of probation, but said that he could not raise the issue because he participated in the hearing without objection and "cannot now be heard to complain." (Appendix p. 6).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of This Court Requiring Notice To Probationers Of Their Alleged Violations Of Probation Prior To Probation Revocation Hearings.

Prior notice of the charges a person must answer is a basic requirement of due process, one that is clearly required in the context of parole or probation revocations.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); see *In re Gault*, 387 U.S. 1, 31 - 34 (1967); *cf. Goldberg v. Kelley*, 397 U.S. 254, 267 - 68 (1970). Even the State of California seems to agree, for it did not challenge the holding of the Ninth Circuit with regard to notice in the case of *Clutchette v. Procunier*, 497 F.2d 809, 818 (9th Cir. 1974). *Baxter v. Palmigiano*, 425 U.S. 308, 324 n. 6 (1976).

The function of notice is to give the charged party a chance to marshal the facts in his defense and to prepare to meet the charges against him. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1964). Thus, in order to meet constitutional muster, notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged conduct with particularity.' " *In re Gault, supra*, 387 U.S. at 33 (footnote omitted).

In the context of this case, notice was especially critical. Had the basis of the state's charges been disclosed in a timely fashion, Stones might well have pointed out to the trial court, as he was successfully able to do on appeal, that the acts complained of did not violate all of the conditions of probation found by the trier of fact to have been violated. Such a result might well have altered the decision of the trial court to revoke probation.

The failure of the trial court to provide Stones with a written statement of his alleged violations of probation made the proceedings in the trial court a farce and a sham. See *Powell v. Alabama*, 287 U.S. 45, 57 (1932).[1] Stones'

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[1] See *Gagnon v. Scarpelli, supra*, 411 U.S. at 789.

probation was revoked without his ever having the opportunity to prepare to meet and answer the charges against him. It was revoked in a manner which deprived him of due process of law guaranteed to him by the Fifth Amendment, and that revocation should be set aside.

2. The Reliance By An Appellate Court On Grounds Not Relied Upon By The Finder Of Fact In Affirming A Probation Revocation Flies In The Face Of The Rationale Behind This Court's Decision In *Gagnon v. Scarpelli.*

Gagnon v. Scarpelli, following *Morrissey v. Brewer,* set forth a procedure for determining the appropriateness of the decision to continue or to terminate a person's freedom on probation consistent with due process. Both *Gagnon* and *Morrissey* require that a decision to revoke probation or parole be accompanied by a "written statement by the factfinders as to the evidence relied upon and the reasons for revoking [probation or] parole." *Gagnon v. Scarpelli, supra,* 411 U.S. at 786.

The requirement in *Gagnon* that a finder of fact set forth his reasons for revoking probation and the evidence relied upon by him is a meaningless one if a reviewing court may substitute its own reasons or evidence for those of the factfinder. If the hearing mandated by the due process clause is to be a meaningful one, the decision of the factfinder must be reviewed by an examination of the correctness of his actions as he saw them. The reviewing court must determine whether the evidence relied upon by the factfinder supports *his* reasons for revoking probation.

Here, the Court of Appeal substituted its own reasons for revocation for those of the factfinder and its own evidence relied upon for his. That action was tantamount to a new "hearing" in the Court of Appeal, but one without evidence or the opportunity to be heard. The Court of Appeal did not *review* the reasons for revocation and the evidence relied upon by the finder of fact but redetermined the correctness of his *conclusion* and affirmed the revocation. That court was improper and not in compliance with due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District.

Respectfully submitted,

BURTON MARKS of

MARKS, GREEN & DENBO

Counsel for Petitioner

INDEX TO APPENDIXES

APPENDIX "A"

OPINION BELOW

NOT FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. THOMAS JACKSON STONES, JR., Defendant and Appellant

2D CRIM. NO. 32160 (Super. Ct. No. A 132932).

[FILED November 14, 1978]

Appellant was convicted on a plea of nolo contendere of conspiracy and fraud in the sale of securities; judgment was suspended and appellant was granted probation for a period of ten years, conditioned inter alia upon the commitment he would "not participate in any way in the sale or dissemination of any securities or tax shelter programs without first seeking approval of the program or venture from the appropriate authorities, including but not limited to the Securities Exchange Commission, The California Division of Corporations, and the State Franchise Tax Board" nor "participate in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the Probation Office supervising his probation and, if the venture will likely take place in whole or in part in Ventura [or Los Angeles] County, he shall not participate in the venture without first fully informing the District Attorney of the County of Ventura [or Los Angeles as the case might be] of the details of the contemplated venture."

A further condition of appellant's probation required he would "obey all laws, orders, rules and regulations of the Court and of the Probation Department." On November 28, 1977 probation was revoked and appellant was ordered imprisoned for the term prescribed by law for his crimes. The appeal is from that determination.

The evidence elicited at the revocation hearing disclosed Laurence Casey, an F.B.I. special agent, met with appellant and Charles Marko in October of 1976 as part of an investigation of appellant's activities in securities transactions. Casey posed as an insurance company executive seeking to remedy a dollar impairment in his company through the acquisition of financial paper at discount. Marko was an acquaintance of appellant and a government informant.

Appellant ultimately agreed to provide $46,000 worth of bonds against receipt of $2,000 in cash and Marko's note for $4,500. Casey was later advised by a fellow agent the bonds were stolen, although charges against appellant in a prosecution for the alleged theft were dismissed.

Other activities of appellant claimed to be questionable were also touched upon without any clear showing they were illegal or attributable to appellant.

The trial court concluded:

"THE COURT: The Court finds the defendant in violation of his probation, and would state on the record its reason for so doing.

"It finds that the defendant did in fact engage in conduct that was expressly prohibited by the condition

set forth in the probation report, namely, I believe it would be condition number 7, the defendant shall not participate in any way in the sale or dissemination of any securities or tax shelter program without first seeking approval of the program or venture from the appropriate authorities, including but not limited to the Securities Exchange Commission, the California Division of Corporations, and the State Franchise Tax Board, and I think eight would also apply, shall not participate in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the probation officer or office supervising the probation, and the venture would likely take place in whole or in part in Ventura County, he shall not participate in the venture without first fully informing the district attorney of the County of Ventura of the details of the complete venture.

"The Court finds after its research that a bond, promissory note are both defined in Corporations Code Section 25019 as securities within the contemplation of that code, and the defendant, the Court finds, sold these bonds and took in return a promissory note, so he would be in direct violation of these conditions that were set forth in the probation report.

"There are numerous other matters that the defendant has engaged in that would indicate that he probably is in further violation, but I think on the record that this one transaction would be the one most obvious and most significant.

"The Court would also find that the defendant as a reasonable person certainly had reasonable cause to believe these items were stolen or were in some manner

acquired improperly, and he was on notice of that fact in view of the sale price of these items was substantially lower than their face value and indeed substantially lower than their value, period, irrespective of face value."

Appellant contends:

1. There was no violation of the previously herein quoted terms of probation.

2. The judgment cannot be sustained on the theory the bonds were stolen and that therefore appellant failed to obey all laws.

3. That the *"Morrissey-Vickers"*[1] requirements were not met in that:

(a) appellant was not given written notice of the claimed violations;

(b) he was not accorded the right to confront and cross-examine adverse witnesses; and

(c) there was no prerevocation hearing.

As part of its first contention, appellant urges there is no evidence in the record showing he did not first seek approval from the enumerated agencies and that even if there were it would be of no consequence, because such approval could not have been obtained in any event. The Franchise Tax Board, he maintains, is without authority to "approve" securities transactions and the Division of Corporations and SEC are expressly prohibited from so doing. Moreover, he says, the issuance or transfer involved could not have been registered with the Commission nor

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[1] *Morrissey v. Brewer* (1972) 408 U.S. 471; *People v. Vickers* (1972) 8 Cal.3d 451.

qualified by the Division's permit since the securities were exempt or the transaction he engaged in was exempt. (See Corporations Code, sections 25100(a), (e); 10 California Administrative Code, Special Publications, Release No. 27-c; 15 U.S.C. sections 77c(2), 77d(1).)

Similarly, the argument is made, there is no evidence appellant did not inform the district attorney and no finding he failed to inform the probation office. It is conceded the probation report contains a statement that appellant never discussed with the probation officer an intention to engage in the sale of securities, that the report was read by the trial court (which stated it would be received), but maintained that, in fact, it was neither marked as an exhibit nor actually received in evidence.

There could be doubt whether an adequate showing was made which would have supported the conclusion appellant was aware the bonds were stolen. (See *People v. Buford* (1974) 42 Cal. App. 3d 975.) Accordingly, we accept appellant's second contention. We are likewise inclined, for purposes of argument, to accept appellant's ingenious, if strained, contention there was no probation violation in his not seeking agency approval for sale of the bonds to Casey. But we find no difficulty in concluding the trial court was justified in its action based upon its implicit finding no notice had been provided to the probation office or the district attorney. A probation revocation proceeding is not circumscribed by the requirements of more formal proceedings. The revocation hearing "is not to be equated with a criminal prosecution in any sense. It is a narrow inquiry, and its procedures are to be flexible." (*People v. Buford, supra,* at p. 983.) So where, as

here, there is no doubt reliance is placed upon documentary information contained in a probation report and that fact is clear to the probationer, it is not true that failure to have the document formally received in evidence is fatal.

Additionally, probation may be revoked if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer *or otherwise* that the probationer has violated any condition of his probation. (Penal Code, section 1203.2(a).) And while the statutory phrase contained in section 1203.2(a) " 'or otherwise' must refer to a showing comparable to or of equal solemnity with a report of a probation officer," (*In re Davis* (1951) 37 Cal. 2d 872, 874), that requirement is satisfied when testimony of a credible witness like Casey sufficiently shows appellant's misconduct.

Thus, whether we conclude the probation report was properly considered or that the court could have based its determination on Casey's testimony, the result is the same, and this is so even in the absence of an affirmative showing by respondent of the fact there was no notice given to the probation office or the district attorney of appellant's activities in securities, since being in the nature of a negative averment, the burden for showing the contrary may fairly be placed upon appellant. (See *People v. Montalvo* (1971) 4 Cal. 3d 328.)

Concerning appellant's claim he was not provided written notice of claimed violations, it is enough to say he participated fully in the hearing without objection at its outset and during the course thereof and cannot now be heard to complain. (*People v. Baker* (1974) 38 Cal. App. 3d 625; see also *People v. Buford, supra*; cf. *In re Duran* (1974) 38 Cal. App. 3d 632.)

Appellant's contention he was not accorded the right to cross-examine adverse witnesses is relevant only to the assertion he had failed to obey all laws in that he had engaged in other questionable transactions and that he was aware the bonds sold to Casey were stolen. We have pointed out neither of these assertions formed the basis for the trial court's conclusion regarding failure to notify and neither is pertinent on this appeal. (See *In re La Croix* (1974) 12 Cal. 3d 146.)

Finally, appellant's contention he should obtain relief because no prerevocation hearing was held cannot be sustained. The setting contemplated for the requirement, as derived from *Morrissey v. Brewer, supra,* is one where a parolee or probationer is arrested and deprived of his conditional freedom pending a revocation determination which might be long in coming. Just as in the case of one accused of crime, the accepted conclusion is there must be some preliminary opportunity to be heard on the question whether the further contemplated proceedings are justifiable. Here, however, the record appears to indicate no deprivation of liberty occurred, at least insofar as revocation was concerned.[2]

Moreover, even if it were established otherwise, appellant raised no objection on the point before the trial court and it is not available to him now. (*People v. Hawkins* (1975) 44 Cal. App. 3d 958; cf. *People v.*

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[2]Appellant was independently charged with receipt of stolen property and the revocation hearing was set to trail that matter. We are not aware whether any continuing custody was involved in that case but there is no indication that in the instant matter appellant was ever anything but free on his own recognizance.

Hidalgo (1978) 78 Cal. App. 3d 675.)

The judgment appealed from is affirmed.

NOT FOR PUBLICATION.

ROTH, P.J.

We concur:

FLEMING, J.

COMPTON, J.

APPENDIX "B"

DENIAL OF HEARING
(Post Card)

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Jan. 24, 1979

I have this day filed Order

HEARING DENIED

In re: 2 CRIM. NO. 32160

People of the State of California

vs.

Thomas Jackson Stones, Jr.

Respectfully,

G. E. Bishel,
Clerk.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on APRIL 23, 1979, I served the within PETITION FOR WRIT OF CERTIORARI (THOMAS JACKSON STONES, JR. vs. STATE OF CALIFORNIA) on the following named party by depositing two copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said party at the address as follows:

OFFICE OF THE ATTORNEY GENERAL
3580 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 23 1979, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Document forwarded to Washington, D. C. - Monday, April 23, 1979, via EXPRESS MAIL.

Dean-Standefer, 326½ Main St., Huntington Beach, California 92648
(714) 536-7161